toto.[18] Such a decree, however, is not entitled to recognition under the "full faith and credit" clause of the Federal Constitution.[19] Another, and, it is submitted, more reasonable rule requires some kind of personal service on the non-resident defendant.[20] Such a rule prevents the defendant from the granting of a decree against him of which he or she is entirely ignorant, or at least requires that the plaintiff show *bona fides* by attempting personal service at the place the defendant was last known to be.[21] The principal case is in accord with this rule, which is just and equitable to all concerned. In only one jurisdiction does the rule seem to be more strict than as just stated. In New York even personal service on a non-resident defendant has been held not to confer jurisdiction on the foreign court so as to entitle its decree to recognition.[22] It would seem, however, that sufficient protection is given to the rights of the defendant without requiring him or her to be an actual resident of the State of the *forum,* provided personal service is made. Of course, a general appearance entered by a non-resident defendant, either in person or by attorney, gives the court jurisdiction of such defendant.[23] And a decree upon such appearance by a defendant is entitled to full faith and credit under the Federal Constitution.[24]

R. M. G.

TORTS—PROXIMATE AND REMOTE CAUSE—INTERVENING ACTS OF A THIRD PERSON—The question of how far a wrongdoer should be held responsible for the results of his wrongful act when there has been some wrongful or negligent interference by a third person between the original wrong and the resulting injury, is from its very nature a complicated one. It is even more so today than formerly, for so far-reaching and varied in a highly developed civilization are the results of what might seem to be the least important act, that every wrong drags after it a chain of more or less disastrous con-

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[18] Harris v. Harris, 115 N. C. 587 (1894); McCreery v. Davis, 44 S. C. 195 (1894); Winston v. Winston, 165 N. Y. 553 (1901); Zerfas' Appeal, 135 Pa. 522 (1890); Hein's Estate, 22 Pa. Super. Ct. 31 (1903).

[19] Haddock v. Haddock, 201 U. S. 562 (1906). *Cf.* Atherton v. Atherton, 181 U. S. 155 (1901), where the wife deserted and the husband sued for divorce, the only service on the wife being an attempted service through the mails, which failed. It was held that the wife had never acquired a new domicile, and the decree was therefore binding extra-territorially under the full faith and credit clause of the Federal Constitution.

[20] Felt v. Felt, *supra,* n. 6; Loker v. Gerald, *supra,* n. 3; Harding v. Allen, 9 Me. 140 (1832).

[21] Atherton v. Atherton, *supra,* n. 19.

[22] Williams v. Williams, 130 N. Y. 193 (1891); Matter of Kimball, 155 N. Y. 62 (1898).

[23] Cheever v. Wilson, *supra,* n. 6; Arrington v. Arrington, 102 N. C. 491 (1889).

[24] Cheever v. Wilson, *supra,* n. 6; Lynde v. Lynde, 162 N. Y. 405 (1900).

sequences, which in truth might well be ascribed to the initial tort-feasor. It is therefore not surprising to find no little amount of confusion in the cases, especially in view of the fact that the law in this respect is still in a more or less transitory condition.

There are two extreme positions and between them is the ground upon which is waged the struggle for a satisfactory mean. The one, that if the original wrong be the *causa sine qua non,* the wrongdoer should be held responsible, is obviously too broad; the other, that the defendant should be liable only if his act be the actual immediate cause, is, on the contrary, as plainly too narrow. What, then, should be the compromise?

The early tendency undoubtedly was to restrict liability, and any wrongful intervention relieved the original tort-feasor. The theory was that where there were two successive wrongdoers, the one nearest the resulting injury should suffer. The courts would not look behind the wrong of the intervening agent and determine what wrong of the defendant had given occasion for the third person's wrong to the plaintiff. This was true even in cases where the third person could not be found. As late as 1806, Lord Ellenborough refused to set aside the nonsuit of a journeyman who had lost his position as a result of the defendant's slanderous words, because his master had wrongfully broken his contract to discharge him.[1] But the broad principle of this case, though it has been cited with approval upon several later occasions,[2] has not been followed to any extent, except in one class of case, *viz.,* that in which slander is repeated.[3] In all other cases the tendency is toward a much wider scope of responsibility, and no longer is it always an excuse that some subsequent wrong of a third person has intervened.

The idea soon crept in that if a person not legally responsible should intervene, such as a child or a lunatic, the original wrongdoer should not be relieved. From this it was but a step to the position that where a third person, in an attempt to avoid the defendant's wrong by removing a condition that interferes with the enjoyment of his rights and privileges, negligently causes the plaintiff's injury, the defendant nevertheless should be liable. This was recognized in the case of *Clark* v. *Chambers,*[4] where a third person removed an

[1] Vicars v. Wilcocks, 8 East. 1 (Eng. 1806).

[2] Crain v. Petrie, 6 Hill, 522 (N. Y. 1844); Hughes v. McDonough, 43 N. J. L. 459 (1881); Cate v. Cate, 50 N. H. 144 (1870); Fawcett v. R. R., 24 W. Va. 759 (1884). See also Cooley on Torts (3rd Ed.), p. 101, and Currier v. McKee, 99 Me. 364 (1904).

[3] There is an arbitrary exception to the modern conception of proximate and remote cause in the case of an originator of slander or libel, who is not liable for the results of its unauthorized repetition, no matter how clearly such repetition may fall within the causation sequence. See the case of Shoepflin v. Coffey, 162 N. Y. 12 (1900), and Blake Odgers' "Libel and Slander" (4th ed.), pp. 388-389, where it is said, "The repetition by a free agent is neither a direct nor a natural result."

[4] L. R., 3 Q. B. Div. 327 (1878).

obstruction in the highway left by the defendant, but negligently placed it across the foot-path, thereby causing injury to the plaintiff.[5] Also the idea was soon recognized that where a stranger acts negligently in an effort to make safe a condition created by the defendant's wrong and harmful to the public, the defendant should be held, notwithstanding, for the resulting injury.[6] And the position was also taken that the defendant should be liable even where strangers act negligently in assisting one injured by the defendant's wrong.[7]

It was not long moreover before the courts came to regard even the fact that strangers have intervened negligently with no color of cause whatever for the interference, as insufficient in itself to break the chain of causation. So the "habitually thoughtless, though legally culpable, inadvertences of careless people"[8] are not sufficient to render the defendant free from liability and his act is considered the proximate cause despite the "occasional negligence which is one of the ordinary incidents of human life"[9] which might have intervened. Cases of this sort crowd the reports and are invariably disposed of in accordance with this view. In this category fall the many cases where workmen are injured by the negligent use by fellow employees of defective tools and machinery;[10] where materials carelessly piled or placed in dangerous positions are disturbed by the negligence of others;[11] or where elevator doors, left unfastened, are carelessly opened by strangers.[12]

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[5] See also Fishburn v. Railway Co., 127 Iowa, 483 (1905), and remarks of Elliott, C. J., in Bloom v. Ins. Co., 97 Ind. 478 (1884).

[6] Henry v. Dennis, 93 Ind. 452 (1883), where a passerby, seeing cows about to drink fish-brine left in open barrels in the street by the defendant, emptied the barrels into the gutter, where the plaintiff's cows drank it. See also Williams v. Koehler Co., 41 N. Y. App. Div. 420 (1899), where a stranger negligently drove back a horse which had wandered from the street where the defendant had left it untied.

[7] Pullman Co. v. Bluhm, 109 Ill. 20 (1884); Wallace v. P. R. R., *222* Pa. 556 (1909); the latter a case of the negligence of a physician. But see *contra*, Ties v. Smuggler Mining Co., 158 Fed. Rep. 260 (1907), where a miner, imperilled by the defendant's negligence, was injured by the negligence of rescuers.

[8] Bohlen, "Cases on Torts," p. 290. See also Allen, J., in McCauley v. Norcross, 155 Mass. 584 (1892).

[9] Lord Halsbury, quoted by Gibson, J., in Murphy v. Great Northern Railway Co., I. R. [1897] 2 Q. B. 312.

[10] R. R. v. Cummings, 106 U. S. 700 (1882); Armour v. Golkowska, *202* Ill. 144 (1903); R. R. v. Perriquey, 138 Ind. 414 (1893); Wallace v. Henderson, *211* Pa. 142 (1905).

[11] McCauley v. Norcross, *supra*, n. 8; The J. B. Thomas, 81 Fed. Rep. 578 (1897); Pastene v. Adams, 49 Cal. 87 (1874).

[12] Tousey v. Roberts, 114 N. Y. 312 (1889); *contra*, Cole v. German Saving Society, 124 Fed. Rep. 113 (1903). But see the irreconcilable case of Stone v. R. R., 171 Mass. 536 (1898), where the defendant company was held not liable for storing inflammables in a freight house in violation of a statute, where they were ignited by a match carelessly thrown by a shipper.

But the courts have not stopped here. They have carried the liability of the original tort-feasor to a much greater distance and practically all jurisdictions now regard it as no excuse even that a wilful and deliberate wrongful act has intervened, if, in fact, the defendant could have anticipated that some interference might have occurred.[13] This larger conception can be traced to *dicta* in the case of *Collins* v. *The Middle Level Commissioners,*[14] but it has found expression in innumerable decisions since, and has become an unquestionable rule. In that case the defendant's negligence in constructing a culvert created a condition which caused third persons to intervene, and by tearing down an obstruction built by the plaintiff to protect himself, to cause the latter's lands to become flooded. The defendants were held liable. The court was not convinced that the third persons were beyond their rights in interfering, but held, in the opinion of Mr. Justice Brett, that, assuming that they were wrongdoers, "the primary and substantial cause of the injury" was the negligence of the Commissioners.

But this point marks the parting of the judicial ways. Having gone so far, many courts stubbornly refuse to advance further, while others have allowed themselves to be carried nearer the ultimate conclusion to which their reasoning must necessarily lead them. The difference in the positions of the American and English courts at this point is marked, the latter having gone to much greater lengths in enforcing the liability of the original wrongdoer. A distinction is drawn between acts which are wrongful and deliberate, but the particular consequences of which are not intended, and those done with evil intent and where some actual resulting harm is intended. In the latter case many courts, especially in this country, steadfastly refuse to give the injured plaintiff relief against the first wrongdoer, regarding the interference as sufficient to destroy the effect of the original wrongful act as an efficient cause.

It is submitted that such a distinction, at best but a matter of degree, is arbitrary and logically should have no effect upon the question. Because in one case a stranger has wilfully intervened, but with no evil intent in his heart, while in the other he has interfered for the express purpose of causing harm, is there any reason to give the one more effect than the other upon the problem of cause and effect? Surely the fact that one act was done in a spirit of mischief, the other in a spirit of malice, should not have any ma-

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[13] Of course the primary fact of negligence must be proved in all cases. The defendant must have been able to have foreseen that some intervention might occur, though the particular form of interference need not have been anticipated. So in Glassey v. Worcester, 185 Mass. 315 (1904), the court held the defendant company could not be expected to have foreseen that harm would result from the leaving of a heavy reel of wire on its side in the highway, and could not be held liable when children righted it and rolled it down a hill.

[14] L. R., 4 C. P. 279 (1869).

terial bearing upon the question. Yet such is the distinction drawn by the courts and upon this rock do the cases split.[15]

It is said that no liability should attach to one who by his wrongful act creates a condition which affords a third person an opportunity to do a deliberate harmful act to another. While this is fundamentally true in most cases, it is submitted that this is primarily a question of negligence and that it should not be allowed to cloud the question of whether such an interference is sufficient materially to disturb the chain of causation. Without negligence there can be no liability, and the plaintiff must prove that the defendant has been negligent toward the person actually injured, or toward a class of society of which he is a member, but this is a matter entirely separate and distinct from the problem of proximate and remote cause. Depending as they do, one upon what the reasonable man should have anticipated had he paused to reflect, the other upon the natural sequence of causation viewed in the light of what has actually taken place, it is difficult to understand how the two can be confused.

But to some such confusion of the underlying principles must the attitude of the American courts be ascribed. In a case in Indiana,[16] where a prisoner deliberatelly threw a deputy sheriff into an excavation negligently left in the highway, the town authorities were held not liable, because the prisoner was an "intervening independent human agency" thus "making the party guilty of negligence in the first instance not responsible". In a California case,[17] for the same reason, the defendant was relieved from responsibility when a child was thrown by its infuriated brother into a pond left unguarded near a place where children were known to congregate. In these cases, which illustrate the general type of such situations, while the actual decision reached by the courts is probably not open to dispute, was the defendant negligent toward the plaintiff? Had

[15] In the following cases, though the intervening act was deliberate and intentional, because the particular consequences were not premeditated and planned in advance, recovery was permitted: Lynch v. Nurdin, 1 A. & E. (N. S.) 29 (Eng. 1841), horse left untied, started by one in a spirit of mischief; Engelhart v. Farrant, L. R. [1897] 1 Q. B. 240, defendant liable because driver of his cart left it in charge of another who deliberately drove off, though told not to do so; Thompson v. Platt, 44 App. Div. 291 (N. Y. 1899), no excuse that boys, by teasing and throwing stones, started a horse left insecurely tied by defendant; Lane v. Atlantic Works, 111 Mass. 136 (1872), where defendant who had negligently piled iron on his truck was held liable when boys, who had started the truck and climbed thereon, knocked off the iron upon the plaintiff; True and True v. Woda, 201 Ill. 315 (1903), material, carelessly piled, thrown down by children in play; Harrison v. K. C. Electric Co., 195 Mo. 606 (1906), circuit completed by the plaintiff's son cutting a wire in two; Steel Co. v. Wilkinson, 69 Atl. Rep. 412 (Md. 1908), horse frightened by bystanders swinging a rope left by the defendant across the highway; Sullivan v. Creed, I. R. [1904] 2 K. B. 317, boy thinking a gun left by defendant in an improper place, unloaded, pointed it at a friend.

[16] Alexander v. Town of New Castle, 155 Ind. 51 (1888).

[17] Loftus v. Dehail, 133 Cal. 214 (1901).

the defendant known that interference of a human agency in such a manner might take place and cause harm, could it be logically maintained then that such interference should relieve him of responsibility? Where one knows or has reason to know that his act will give another the opportunity to do deliberate harm to another, or even the chance to commit a wanton crime, should the fact that that other takes advantage of the opportunity afforded him, prove a valid excuse to the defendant? If the defendant has been negligent toward the plaintiff in such a way, is not his act the proximate cause, despite the interference? It is submitted that the position of the American courts, which invariably answer this question in the negative, can not be justified on principle.

In a Georgia case,[18] a lessee of convicts carelessly permitted a negro of the lowest type to escape, but was held not liable for a rape subsequently committed by him. In Illinois[19] a sheriff negligently allowed the escape of a prisoner who was under indictment for assault with intent to murder the plaintiff, and whom he had reason to know to be apt to renew the assault upon the first opportunity. The prisoner did assault the plaintiff again, but the court held that this was not proximately caused by the escape. In a case in North Carolina[20] the keeper of an insane asylum who negligently discharged as cured a dangerous maniac, was held not liable for a murder committed by him later, on the ground that the keeper's negligence was not the proximate cause but the mere occasion for the homicide. These cases represent the prevailing view in this country, though there is a decided scarcity of decisions upon this exact point. In all of them, the defendant has by his act knowingly allowed another to assume a position to do harm to a third person. By his negligence the defendant has given one of known dangerous proclivities the chance to exercise his abnormal tendencies, the opportunity to do the very thing which the defendant should have known he would do if the occasion presented itself. Can it be justly said that he should go unpunished?

The English courts have fairly met this problem. In the case of *De la Bere* v. *Pearson*[21] the financial editor of a newspaper recommended a certain broker to a reader without proper investigation, the broker being "outside" the exchange and an undischarged bankrupt. The defendant newspaper was held responsible for the broker's embezzlement, the court taking the view that the recommendation was the "primary and substantial cause of the plaintiff's loss of money", even though a crime had intervened. There is also a case in Scotland which, eight years before, laid down the same rule.[22] There the Caledonian Railway Company, by virtue of a

[18] Henderson v. Dade Coal Co., 100 Ga. 568 (1897).

[19] Hullinger v. Worrell, 83 Ill. 220 (1876).

[20] Ballinger v. Rader, 151 N. C. 383 (1909).

[21] L. R. [1907] 1 K. B. 483.

[22] Marshall v. Caledonian Railway Co., 1 Session Cases, 5th sec., 1060 (1899).

statute, underpinned the pursuer's premises, but negligently left a large hole in the wall leading to the cellar, through which a thief entered. The defender company claimed that the thief broke the chain of causation and cited the authority of *Vicars* v. *Wilcocks*,[23] but the court refused to follow the earlier rule and found no difficulty in connecting the loss of the pursuer with the defender's negligence, despite the criminal act of the intervening third party.

With this conflict of opinion as a background, every new case of the kind which appears at once assumes a special significance. The curious attitude taken by the American courts makes each case of value and in this connection it is interesting to note a recent decision of the Massachusetts court. A bishop in the Roman Catholic Church appointed to a certain parish a priest whom he knew to be "of vicious and degenerate tendencies and gross sexual proclivities". While in the act of a religious service a female parishioner was ravished at the altar, but the court refused to place the responsibility upon the bishop.[24] It was admitted by the court that despite the independent act of a third person, "the defendant's earlier negligence may be found to be the direct and proximate cause of the injurious consequences", but the extension of the rule was denied to the case "where the independent, wrongful act that intervenes is an atrocious crime", even if that particular crime could have been anticipated. Had the priest merely seduced the girl, the court was of the opinion that the bishop would have been liable, but a distinction was found in the fact that the priest had committed rape. Can such reasoning be accepted without question? The test applied really amounts to whether the plaintiff resisted the outrageous attempts of the priest. She did resist; her seducer was compelled to use force; and thereby, through the subtle workings of some inexplicable process, the bishop was relieved of any responsibility. Had she been less able to withstand the stress of temptation the latter would have been made to answer for the priest's misconduct.[25]

Such a decision might adapt itself to a system of jurisprudence whose function it is to protect the wrongdoer from the full measure of his punishment, but can it be said to fit in with the well established doctrines which form the foundation of the modern conception of tort liability?

L. B. S.

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[23] *Supra*, n. 1.

[24] Carini v. Beaven, 106 N. E. Rep. 589 (1914).

[25] See also the opinion of Stewart, J., in the recent case of Nirdlinger v. American District Telegraph Co., 91 Atl. Rep. 883 (Pa. 1914), where it was held that the negligence of the defendant's employee in failing to reset a burglar alarm was not the proximate cause of the plaintiff's loss of goods by theft, though the defendant company had expressly contracted to furnish protection in the event of burglary, the felonious entry by the thief being considered a sufficient interruption to wipe out any liability of the defendant company.